Committee on Resources

Subcommittee on Forests & Forest Health

Witness Statement

STATEMENT OF

THE AMERICAN FARM BUREAU FEDERATION

TO THE

FORESTS AND FOREST HEALTH SUBCOMMITTEE

HOUSE RESOURCES COMMITTEE

REGARDING

PROPOSED FOREST PLANNING REGULATIONS

Presented by

Frank Priestley

President

Idaho Farm Bureau Federation

March 2, 2000

Madam Chairman and members of the committee, good morning. My name is Frank Priestley, and I raise dairy heifers, hay and grains near Franklin, Idaho. I am President of the Idaho Farm Bureau Federation, and am appearing today on behalf of the American and Idaho Farm Bureau Federations.

We appreciate your holding this hearing today, because we have a number of serious concerns with the drastic changes that the Forest Service has proposed to its planning regulations. The proposal ignores Congressional direction to manage the national forests for multiple uses, and in the process disavows the very premise upon which Congress created the national forest system.

I am submitting a copy of our extensive comments to the agency for the hearing record.

What I would like to discuss with you today, in the limited time that I have, is the negative impact that these rules will have on states and local communities when they seek to participate in the planning process. States and local communities have a vested interest in how nearby national forest lands are managed. Local residents use forest lands for recreational use, livestock grazing, and travel routes, among other uses. Surrounding private lands are impacted by the uses or non-uses of forest lands. This dependence is

especially true in the West, where the percentage of federal land ownership is particularly high.

The proposal pays lip service to collaborative forest planning, but the proposal removes any requirement for collaborative planning. Section 219.12(a) states: "The responsible official has full discretion to determine how and to what extent to use the collaborative processes outlined in Secs. 219.12 through 219.18." This grant of discretion completely negates the force and effect of the collaborative procedure. If forest supervisors in Idaho chose not to use collaborative procedures, there is nothing under the proposed rules that we can do. What good is having such a procedure if the agency official has discretion to avoid it?

The proposed rules would greatly limit the ability of states and local communities to provide meaningful input on how these lands are managed.

First, the proposal encourages the development of national and regional directives for forest land management. The further away from the forest that management decisions are made, the less local public participation becomes a factor. The classic example of this is the administration's roadless policy proposal, which will dictate management for over 40 million acres, or one-fifth of all forest lands. In Idaho, out of 20.5 million acres National Forest System Lands, over 9.2 million acres are Inventoried Roadless Areas. That means the roadless initiative alone would remove our ability to provide meaningful input to management of almost 1/2 of all national forest lands in the state.

Actions such as the proposed roadless areas policy that are mandated from above, will, as the Committee of Scientists puts it, "undercut and render ineffective the planning process set up to create long-term plans." "Nothing, " the Committee says, "is more disheartening to a collaborative planning group than to work for months and years on a plan for some national forest or grassland and then to see it pushed aside by actions from Congress or the administration."

Other forms of national or regional management directives will have a similar impact. This form of top-down management subverts any collaborative planning process and renders the National Environmental Policy Act (NEPA) a mere formality. The forest planning process established by Congress in the National Forest Management Act (NFMA) and the Federal Land Policy and Management Act (FLPMA) was based on state and local input, and the involvement of local residents to develop management strategies that affect their daily lives. The requirement that forest plans comply with NEPA ensures that social, economic, as well as environmental impacts of those management decisions and other alternatives are thoroughly examined. But if the outcomes of those decisions are already pre-determined by national fiat, what remains of any opportunity for public input?

Similarly, the proposal contemplates and even encourages planning on a multi-unit level, perhaps on a regional basis. While there may be some advantages to this type of planning on a unified basis, it still results in the deprivation of local communities to have input into local management decisions. The wider the scale of the unit being considered, the less that public participation counts in determining local management decisions.

Secondly, the proposed rules encourage the Forest Service to make use of regional assessments as a tool to be used in decision-making. These assessments would provide data to be used as a basis for decisions. The problem with this concept is that the Forest Service recognizes and states that these assessments are not subject to public notice and opportunity for public comment.

This means that a potentially significant amount of data that is used as the basis of forest management

decisions would be developed without public accountability. Under this scenario, the agency would be free to develop and use scientific data that has never been critically reviewed.

This is a significant factor, especially in the scientifically fact -driven arena of current forest planning. It is not enough to say that conclusions may be challenged at the Environmental Impact Statement stage, because it often means nothing to challenge conclusions if one cannot also challenge the underlying scientific methodology.

Idaho has a significant amount of national forest lands. We have had wolves placed among us against our will, and will soon be told what we cannot do in areas considered roadless. The proposed changes to the standards and procedures upon which national forest planning would be based reduces even further the input we have into how we live.

As I mentioned before, American Farm Bureau Federation and Idaho Farm Bureau Federation have a number of other concerns with this proposal. But if we are denied effective participation in the planning process, it makes no difference what the rules provide.

Thank you for the opportunity to testify, and I will be happy to answer any questions the committee may have.

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January 27, 2000

CAET-USDA, Attn: Planning Rule

Forest Service, USDA

200 East Broadway, Room 103

P.O. Box 7669

Missoula, MT 59807

RE: Proposed Forest Service Planning Rules

Dear Sir/Madam:

The American Farm Bureau Federation (AFBF) is the largest general farm organization in the United States. AFBF has member state organizations in all 50 states and Puerto Rico, and represents the interests of more than 4.9 million member families. Our members use the national forests and grasslands for a variety of purposes. Farm Bureau members earn their livelihoods by grazing livestock on the forests and grasslands. Our members also use these lands extensively for recreational purposes of all kinds. Finally, they are members of the communities that depend on national forests and grasslands, and benefit economically and socially from a consistent flow of sustainable goods and services from these lands. We are pleased to be able to offer our comments on the changes proposed by the Forest Service in its planning regulations for the national forests and grasslands.

We must note the irony in the timing of these proposed planning rules to coincide with the Notice of Intent

to prepare an Environmental Impact Statement regarding the management of roadless areas within the national forests. On the one hand, the proposed planning regulations discuss an emphasis on collaborative planning efforts that involve state and local governments and as many interested parties as possible; while on the other hand, the executive branch is imposing top-down management edicts for a significant portion of Forest Service lands. The roadless area policy will greatly impact and subvert the entire forest planning process.

AFBF supports the concept of collaborative planning on national forests and grasslands by interested members of the local communities. Actions such as the proposed roadless areas policy that are mandated from above, will, as the Committee of Scientists puts it, "undercut and render ineffective the planning process set up to create long-term plans." "Nothing," the Committee says, "is more disheartening to a collaborative planning group than to work for months and years on a plan for some national forest or grassland and then to see it pushed aside by actions from Congress or the administration."

Even though the two proposals are proceeding on different tracks, they cannot be viewed separately. Of what value is a collaborative planning process if major management actions are

going to be dictated from above? Of what value is a forest planning procedure when there is no discretion on how to manage large segments of national forests?

Of more immediate concern to this rulemaking is whether and to what extent the proposed rules take into account this roadless policy, especially as it impacts local forest planning. This proposal fails to recognize that a certain amount of forest lands are already committed to management as roadless areas, and other lands might therefore be released from consideration from such management in the forest plan.

The national forest planning effort is significantly weakened by the overlay of national directives such as the roadless area policy.

We have a number of other problems and concerns with the proposed changes in the planning regulations:

1. The Proposed Changes are Contrary to Current Law.

By changing the focus of forest system management, the proposal overturns nearly 100 years of management direction in a manner that is not supported by statute.

As stated in the proposal, the overriding goal of managing forests now becomes something called "ecological sustainability." It is defined in the proposal as "the maintenance or restoration of ecological system composition, structure and function which are characteristic of a plan area over time and space..." Regardless how the term is defined, it is clear that sustainable use of the national forests is subordinate to preservation (and thus non-use) of resources. In announcing the change in focus, Secretary of Agriculture Glickman said, "this is a fundamental change in philosophy."

The Secretary is not free to change management direction or philosophy whenever he wants. Regardless of the merits of changing management philosophy, the Secretary must operate within the statutory framework provided by Congress, which gives the Secretary the authority and direction over management of national forest lands. Any change in management philosophy will therefore require a corresponding legislative change. There has been no such legislation.

In fact, this "new philosophy" flies in the face of the very purpose for which the national forest system was established. From the beginning, the 1897 Organic Act provided a balanced approach to forest management between use and protection. As stated in the Act, the purposes of the forest system were "to improve and protect the forests within the reservation, or for the purpose of securing favorable conditions of waterflows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." Those principles remain in effect today.

Out of this grew the Multiple Use-Sustained Yield Act of 1960 (MUSYA), which requires that the renewable surface resources of national forests be managed in such a way that meets the needs of the American people, while still ensuring that the national forests are maintained in such a way as to be passed down to future generations.

The principles of the Multiple Use-Sustained Yield Act are reiterated in the National Forest Management Act (NFMA), as well as in other subsequent statutes.

The proposal ignores the multiple use aspect of the congressional mandate. Instead of requiring national forest units to consider how to accommodate the uses which people make of the forest with the protection of forest resources for the next and succeeding generations, as Congress required, the proposed regulations clearly subordinate the human uses of the national forests.

2. "Ecological Sustainability" Has A Different Meaning than the Statutorily Defined "Sustained Yield."

An example of how the proposed rule conflicts with current statutory direction can be found in how "sustainability" is defined in each. The Report of the Committee of Scientists admits that "sustainability" is defined differently in the proposal than it is in the MUSYA.

The MUSYA defines "sustained yield" to mean the "achievement and maintenance in perpetuity of a high-level annual or periodic output of the various renewable resources." The NFMA takes these MUSYA priorities as a given: the "Secretary shall assure that such [forest] plans...provide for multiple use and sustained yield of the products and services obtained therefrom [e.g., timber products] in accordance with the Multiple-Use Sustained-Yield Act." 16 U.S.C. 1604(e)(1).

The Organic Act, MUSYA, NFMA and related statutes contemplate a regular use of renewable forest resources such as timber and grazing in such a way as to sustain their production and use and thereby renew the forests.

These concepts do not appear in the proposed rules. The social and economic "sustainability" mentioned in the proposal is clearly subordinate to ecological sustainability in intended operation of the proposed rules. Production and use will only occur under the new rules only after other goals have been achieved. That is contrary to the statutory direction. "Multiple use" and "sustained yield" are not defined or referenced in the proposed rules.

3. The Stated Goal of "Ecological Sustainability" is Vague, Indefinite, and Contrary to Current Law.

"Ecological sustainability" is the stated goal of the new forest management planning focus. It is defined in the proposal as "the maintenance or restoration of ecological system composition, structure and function which are characteristic of a plan area over time and space, including, but not limited to ecological processes, biological diversity, and the productive capacity of ecological systems." The terms "ecological

structure" and "ecological integrity" are also defined in the proposed rule.

The proposal adopts the recommendation of the Committee of Scientists that "ecological sustainability" should be the "guiding star for stewardship of the national forests and grasslands." But it turns out that this 'guiding star' provides no guidance at all. Even the Committee of Scientists admits that the term "is broadly aspirational and can be difficult to define in concrete terms."

Neither the Committee nor the proposal sheds any light on the meaning of this "guiding star." There are no measurable, objective, quantitative standards upon which to base the concept of "ecological sustainability." The Report of the Committee of Scientists also admits that the goal that is proposed has never been field tested and is therefore incapable of scientific replication. Instead, the term is defined by even more subjective, qualitative terminology such as "integrity."

For a scientist, this type of subjective and qualitative approach might have meaning, although the inability to scientifically replicate conditions using this terminology should be a considerable obstacle. For a planner, attempting to achieve a qualitative and amorphous goal is an impossible task. On the other hand, there is no accountability, and the planner has no direction.

To base a national management direction on untested and experimental principles is irresponsible. At this stage of its development, "ecological sustainability," as a concept, does not have the scientific reliability to base an entire management direction.

4. Defining "Historic Range of Variability" in Terms of "Pre-European conditions" Ignores Human Activity and Needs, and is Contrary to Established Law.

Another factor indicating that the proposed rules ignore the current congressional mandate of "multiple use-sustained yield" is that the proposed rule defines "sustainability" in terms of "pre-European conditions."

The focus of "ecological sustainability" is to maintain and restore forests to their "historic range of variability." That term is defined as the "limits of change in composition, structure and processes of the biological and physical components of an ecosystem resulting from natural variations in the frequency, magnitude, and patterns of natural disturbance and ecological processes characteristic of an area before European settlement."

The entire thrust of the proposed management direction is toward "natural variations" and disturbances to a time before European settlement. This ignores any impact to the forest caused by timbering, grazing, mining and any multiple use of the land.

Any mandated direction to maintain and restore conditions to times "before European settlement." necessarily ignores human impacts over the past 200 years. It also severely limits, if not downright prohibits, any future human uses provided under MUSYA or NFMA. To permit such uses would necessarily not move forest sustainability to a historic range of variability that is defined in terms of pre-European settlement.

The implication of this management direction is to remove human uses of national forests. It is nothing more than a fancy way of prohibiting any human uses within the forests. Multiple use, as defined and practiced for so many years, will become a thing of the past.

The application and definition of "historic range of variability" comes across as a justification to remove

human uses from the national forests. Unless this concept is removed from any final rules, "economic and social sustainability" will be meaningless.

5. Public Participation is Diluted by National or Regional Planning Regimes.

The proposed rules state that one of its goals is to increase public participation in the planning process. Yet, as we have seen, public involvement in determining the future of national forests may actually decrease through implementation of the proposed rule.

The reason for this is because the proposed rules and the current administration contemplate forest management directives from a national or regional level, rather than on the forest level. The farther away from the forest level that policy is made, the less public involvement is a factor.

NFMA contemplates individual forest plans for each national forest unit. Each of those plans, and revisions, would result from the development of an Environmental Impact Statement (EIS) and public notice and comment pursuant to the Administrative Procedures Act (APA). Local citizens provide input on management of local forests.

The proposed rules, on the other hand, recognize and even encourage planning at both the national and regional levels. (section 219.3(b)) These comments have already mentioned the inconsistent position caused by the Notice of Intent to issue national management rules for forest roadless areas. Similar national rules are planned for certain transportation policies. Each such national management edict is one less area in which local communities can provide input into the management of the national forest in their locality.

The same section of the proposed rule also contemplates planning on a regional basis, combining two or more national forest units into one plan. There can be some advantages to planning on such a scale. It may allow for unified management of a watershed or other ecosystem area instead of providing inconsistent forest management. It can also allow focus on a "big picture," instead of several small ones.

But the experience thus far has not produced these advantages. Instead, the agency has used the tactic of combining forest units into one plan in order to centralize management control. The effect has been to eliminate the input from local interests and impose decisions on a regional basis from a central management authority. The proposal perpetuates this decreasing local input.

6. The Proposal Short-Circuits Any Meaningful Review and Revision of the Entire Forest Plan, and is Contrary to Current Law.

Current law and regulations provide that forest plans shall ordinarily be revised every 10 to 15 years. This process generally provides for a review of the goals and objectives of the forest plan, as well as a vision as to what they should be for the next 10 to 15 years.

The proposed rules would "streamline" this approach. They would provide for a public review of the outcomes of the plan to determine if corrections in the plan decisions or changes in management direction are needed. If the responsible officer determines that changes are needed, only that portion of the plan will be revised. The proposal states that this will replace the "zero based" review and revision under current law.

This topic is timely, as most forest plans are in the process of undergoing the cyclic revision described in NFMA. We agree that it would be wasteful and counterproductive to start from scratch in the revision

process. The proposal, however, goes too far and eliminates much of the public participation procedure in the process.

There is a benefit to periodic review of a forest plan as a whole. It provides the local community with the opportunity to reassess desired outcomes. It provides an opportunity to consider changed circumstances or conditions as they relate to the planning unit as a whole. It also provides an opportunity to consider the effects any change might have on the unit as a whole.

The proposal fails to accomplish this. By allowing review of the outcomes and how they compare with desired conditions, the proposal perpetuates the original desired conditions. This puts undue emphasis on the initial planning decisions, and makes it more difficult, if not impossible, to review or revisit those decisions. By only considering those revisions deemed necessary, the proposal also fails to review the plan as a whole. The participation by the public is limited to proposed revisions, instead of the plan as a whole.

We do not believe that revision of forest plans should start from scratch. However, the process of revision should include a meaningful review of the overall goals and the desired conditions of the planning unit, and should consider the impacts any changes would have on the unit as a whole. We suggest modification of the proposed rules to reflect these principles.

7. Broad-scale Assessments and Local Analyses Should Provide Public Participation Requirements.

The proposed rules provide an integral role for the use of broad-scale assessments and local ecological analyses in the development, amendment and revision of forest plans. The proposal emphasizes the fact that these assessments are not decisions and are not subject to NEPA requirements, and therefore are not judicially reviewable. The proposal also says that "their findings and conclusions could be used to inform the planning process and/or develop new topics of general interest or concern." It appears that the proposal contemplates an important role for these assessments as providing information used for planning decisions.

If that is the case, the proposal should require public notice and opportunity to comment on any such assessment or analysis. The information obtained from these assessments and analyses could play an important part in forming the basis for planning decisions. Failure to require public participation or review of these processes would allow the agency to bypass the public participation requirements of the Administrative Procedures Act and this proposal by merely using these procedures to form the basis for decision-making.

Public participation should occur at the time of the assessment or the analysis, not at the time of decision-making. Public participation is only meaningful if done at the time of the assessment or analysis. By the time a decision is made that is based on the results of these assessments, it is too late to scrutinize the underlying assessment or analysis.

If the use of broad-scale assessments or local analyses will provide a better scientific basis for decision-making, then we are in favor of them. However, the proposal should require public scrutiny of these procedures if they are to be used in making forest decisions.

8. The Vague and Indefinite Standards to Determine Suitability of Use Are Inconsistent with the Multiple Use Concept and Could Result in Exclusion of Many Types of Traditional Human Uses.

The proposal (at 29.26) provides a procedure for the identification of areas within the planning unit that are

suitable for a particular use. The converse is that such areas a re not suitable for other uses. This type of designation is contrary to the concept of multiple use that is to guide national forest management.

This power to designate suitability or unsuitability is considerable, given the fact that it can serve to exclude traditional uses from certain areas in the unit. There are, however, no standards to guide this considerable power. The proposal makes no mention of the circumstances in which such power may be invoked, nor does it provide the factors an agency must consider in designating these uses. This provides the agency with unfettered discretion to make such designations at their whim, with little or no accountability.

The proposal indicates that one of the "bases" for excluding forest uses is that it is "incompatible with the National forest mission and resource management goals and objectives." Not only is this vague, but if "ecological sustainability" is defined its strict sense as we indicate above, it would preclude any human use as being inconsistent with that goal.

We urge that the concept of determination of suitability or unsuitability of particular uses be eliminated from the proposal. At a minimum, stringent standards and procedures for such identifications should be put into place to prevent possible governmental abuse.

9. The Recommendation or Designation of other "Special Use Areas" Is Contrary to Law, and Violates Multiple Use and Public Participation Concepts.

New section 29.27 would expand the number of "special use designations" for which national forest system lands may be characterized. It would allow forest plans to designate, or recommend for designation, lands as scenic byways, geological areas, reference areas, wild and scenic rivers, unroaded areas, roadless areas, national natural landmarks and other special designations.

The proposal is unclear how far the agency can go in making such designations, or whether and to what extent the agency can only recommend such areas for designation.

There are a number of problems that we see from using this authority in the context of forest plans.

First, each of the special designations result in taking the subject lands out of productive use. Each of the designations results in further erosion of the multiple use concept in favor of locking up lands for preservation purposes. The more such designations are made, the less these lands are capable of being used and enjoyed by the American people.

For those people who depend on the use of national forest lands, such as ranchers who rely on those lands for livestock grazing, the results can be devastating. Ranch units that include forest grazing permits can be destroyed overnight by their allotments being designated for a special use.

Some of these programs have serious flaws. The national natural landmark program, for example, has been exposed as a secret process that allows lands to be designated and uses of the land being restricted without the knowledge of the landowner or the permittee. Recent amendments to the program have helped, but have not completely removed the taint of this secret process. We cannot condone any action that would promote or expand this program.

Second, most of these types of special use designations are national in scope, and require national coordination. To allow individual forests to make these designations (where allowable) removes the national

coordination necessary for these programs, and instead leaves them at the whim of the forest supervisor.

Third, once designated, it is very difficult to reverse. Such designations typically last a long time, if not forever. Further, these lands are managed by national guidelines and standards. Special use designations remove the flexibility of forest plans to manage the lands so designated.

Fourth, once designated and management dictated from the national level, future generations are virtually hamstrung from taking different actions. If the purpose of any of this is to pass lands along to future generations, those generations must have the ability to manage such lands according to circumstances that exist at the time. These designations prevent those generations from doing this.

Fifth, many of these designations can only be made by Congress. Wilderness and wild and scenic rivers are a couple of examples. The proposed rules usurp this authority of Congress and place such decision-making in the hands of a local forest supervisor. Such a delegation without the consent of Congress obviously exceeds the authority of the agency. Neither the Secretary of Agriculture nor the Chief of the Forest Service can give this type of authority to forest supervisors.

Even if the forest supervisor does not make the actual designation, he is managing the land for wilderness or wild and scenic values. Management of these lands in such a way creates de facto wilderness or other special use designation. (Lands that are formally designated as wilderness, for example, are managed in a certain way. Is there any difference between those lands and lands that may not be formally designated but are managed in the same way?)

As federal land management edicts increase, definitions that mean one thing will take on a completely new meaning and importance as these mandates come down. For example, lands designated as "roadless areas" or "unroaded areas" take on a much greater importance in light of the newly announced federal intention to issue a national roadless area policy.

We strongly urge that this section of the proposed rule be deleted. Any special use designations should follow proper procedures, which do not include designation by forest planning.

10. The Proposed Rule Fails to Address The Forest Service's Relationship and Responsibilities Toward Non-Federal Lands.

In focusing attention on "broad-scale assessments" and ecosystem health, the proposed rule clearly looks beyond individual forest boundaries. The proposed rule hints at some interaction with private landowners, but does not address it clearly. The relationship and impact of the planning process on adjacent private lands within an ecosystem are not clearly spelled out in the proposed rule.

For example, proposed section 219.20(a) requires collection of certain ecological information. One information requirement is "a comprehensive status of ecosystem components and the contribution of National Forest system lands to ecosystem integrity, including species viability, based on consideration of all lands within the area under analysis." (219.20(a)(5)). since ecosystems broader than an individual planning unit almost always contain private lands, does this mean that the agency must make determinations of ecosystem integrity and species viability on private lands within the ecosystem? If so, how is this to be accomplished?

Proposed section 219.17 requires the forest supervisor to "seek to engage" adjacent private landowners in

the determination and consideration of impacts. This section, however, provides very little if any direction on this issue, and certainly does not clarify it at all. Does this place a duty on the private landowner to cooperate? What happens if he/she does not cooperate?

In addition, the proposed rules are silent on the impacts and possible liability of the federal government when changes in management direction dictated by these rules harms adjacent property. For example, in the name of "maintaining or restoring ecological integrity," a forest unit stops controlling weeds or spraying trees near adjacent private property. If the change in direction results in invasive weeds or pests onto private lands, what is the responsibility or liability of the forest? We submit that the landowner must be compensated for his/her damages, but that is not spelled out in the proposal.

These and other landowner impacts, as well as the responsibility of the agency in these and other situations and the rights of adjacent private landowners, should be fully and clearly spelled out.

11. The Proposal Fails to Provide Guidance on NEPA Compliance.

The NFMA requires that "regulations shall include...direction on when and for what plans an environmental impact statement" or EIS is required under the National Environmental Policy Act ("NEPA"). 16 U.S.C. º1604(g)(1). The proposed rules fail to comply with the NFMA because they do not provide any direction on which forest plan revisions and amendments require EISs. The proposed rules (at ºº219.8(a)(1), 219.9(e)) simply state that "appropriate environmental analyses" or an "appropriate NEPA document" will be prepared on forest plan revisions and amendments, without providing direction on when an EIS must be prepared and when an environmental assessment (EA) would suffice.

The current rules satisfied this NFMA obligation by specifying that an EIS is required on each "revision, or significant amendment of a forest plan." 36 C.F.R. '219.12(a). AF&PA urges the Forest Service to retain the existing direction on when an EIS will be prepared. If the agency chooses to depart from its existing regulatory practice, its final rules must provide direction on which forest plan revisions and amendments require an EIS to be in compliance with 16 U.S.C. 1604(g)(1). Further, since the proposed rules provide no proposal for public comment on this important issue, any Forest Service change in the current regulations must first be preceded by notice of a proposed rule for public comment to be in compliance with 5 U.S.C. 553 and the public participation elements of the NFMA.

12. The Pre-Decision Objection Procedure is Meaningless, and Ignores Established Principles of Administrative Law.

Proposed º219.32 allows an appeal or objection to a "proposed amendment or revision" to a forest plan "within 30 days" of the Federal Register publication of "availability of the final environmental impact statement" where one is prepared, or "within 30 days of the [newspaper] publication...of a public notice of the environmental assessment or categorical exclusion of the proposed amendment." As the preamble explains, the intent was to replace the "36 C.F.R. Part 217 land and resource management plan post-decisional appeal process with a pre-decision objection process" - "Under the proposed rule, the responsible official would not be allowed to approve an amendment or revision under objection until a decision on the objection has been reached and documented in an appropriate decision document." 64 Fed. Reg. 54092.

This objection-before-decision approach does not seem to work as a practical matter. How do the affected publics know whether to object and what to object about before one of the alternatives analyzed under the National Environmental Policy Act ("NEPA") is selected as the decision? The EIS or EA analysis on a plan

revision or plan amendment may examine five or more alternative actions, including a no action alternative. Until the Forest Service actually selects an alternative, in a record of decision (ROD) following an EIS or finding of no significant impact and decision document (FONSI) following an EA, as the final decision to be implemented, affected publics will not know whether the Forest Service will be carrying out an action that is objectionable to that portion of the public.

Established principles of administrative law provide that there must be a "final agency action" before a challenge to that decision is made. In the example cited above, the final agency action occurs at the time a Record of Decision is made. Until that time, there is nothing to challenge. An agency can always change its mind pertaining to a "proposed" action unril a final decision is made.

Furthermore, any objections to a proposed action, as set forth in proposed section 219.32, are meaningless, and a waste of agency time and resources. An agency decision that differs from the proposed revision that is objected to moots the entire objection. Why not wait until the decision is final, in the first place?

Moreover, there is already a procedure for people to voice their objections to proposed actions. That procedure is the notice and comment procedure of the Administrative Procedures Act. Comments are the same thing as "objections" under the proposal if the comments oppose the proposed action. To overlay the requirements of proposed section 219.32 on the Administrative Procedures Act is to create a duplicative and wasteful procedure.

Thus, requiring that objections be filed before the decision is known, as the proposed rule would do, is impractical. This approach will: (1) result in many needless objections when people feel compelled to object to just one of the analyzed alternatives, even where it may not be under serious consideration by the Forest Service; and (2) not focus on the key issues, such as when the agency selects an action between two of the analyzed alternatives or adds different mitigation or other measures, and then does not allow the public to object to the agency's final choice. The most practical cure for the proposed rules' defect of forcing people to shoot in the dark at an unknown possible decision would be to transform the pre-decisional objection process into a post-decisional appeal process.

With respect to plan revisions and amendments on which an EIS was prepared, NEPA regulations prevent the agency from identifying the selected decision within the 30-day time frame the proposed rules allow for an objection. The ROD is the document that selects a final action from the alternatives analyzed in an EIS, and the final decision ordinarily cannot be made (and the ROD normally cannot be issued) until 30 days after the Federal Register notice of availability of the EIS. See 40 C.F.R. "1505.2, 1506.10; 46 Fed. Reg. 18026, 18029, 18036 (March 1, 1981) (Council on Environmental Quality's answers to 40 most asked questions on the NEPA regulations). The only "exception" (an exception employed in the current post-decisional appeal process in Part 217) is that the 30 day "[n]o decision" period does not apply if the agency has a "formally established [post-decisional] appeal process." 40 C.F.R. '1506.10(b). In this case, "the decision [the choice of action among several alternatives] may be made and recorded at the same time the environmental impact statement is published" - there, "the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) may run concurrently." Id.

Thus, if the objection must come before the final decision as in the proposed rules, this would alter the Forest Service's current practice of issuing RODs at the same time as the EIS on a forest plan amendment or revision. The only mechanism under the NEPA regulations that allows the ROD to be issued at the same time as the final EIS is to transform the pre-decisional objection process in the proposed rules into a post-decisional appeal process. This approach also avoids the proposed rules' defect of forcing people to shoot in

the dark at an unknown decision. To adopt this approach, the agency should either: (1) maintain the existing 36 C.F.R. Part 217; or (2) substantially amend proposed ºº219.8(a), 219.9(f) and (g), and 219.32 so that they establish a post-decisional appeal process.

13. The Standards for Collaboratively Derived Landscape Goals are Severely Biased Against Multiple Uses.

Proposed section 219.12 provides for the use of collaboration in developing forest plans. This section also provides for the development of landscape goals for the forest unit. In considering this responsibility, however, the proposed rule states that forest managers must "strive to communicate and foster understanding of the nation's declaration of environmental policy" as set forth in NEPA.

What follows is an enumeration of preservationist goals, which skews the entire process away from the balanced application of the multiple use concept towards preservationism. While we agree with the concept of saving forest lands for future generations, the goal should be to make use of its resources today in such a way that it will exist for future generations. We believe this should be the charge to develop landscape goals--both sides of the equation should be presented and considered.

14. The Proposed Rules Contain Too Much Unnecessary Conversational Language that Either Adds Nothing to the Proposal, or Evidences a Bias in the Proposal.

The proposal is written in such a way that it contains a significant amount of narrative, but very little guidance. It states a series of nebulous goals and objectives, framed in terms and in language that is vague, uncertain and ambiguous. As indicated above, terms such as "function," "integrity," and even "sustainability" are qualitative terms that contain very few measurables.

Ecosystem "integrity," for example, can mean any number of things to any number of people. "Ecosystem" can be defined to be as big or as small as the person defining it wants it to be. "Ecosystem integrity" can mean many different things merely by changing the size of the ecosystem measured.

While the proposal contains a lot of fuzzy words that direct the Forest Service away from multiple use, it only points the agency in the desired direction without measuring how far to go.

Where the proposal attempts to get specific, it is often at the expense of exposing its biases against multiple resource use. A prime example is in proposed section 219.20 described above, where the agency is directed to inform collaborating private citizens of all the environmental principles in NEPA. Such bias has no place in agency regulations.

15. The Proposal Relies Too Heavily on Species to Determine Forest Health, to the Exclusion of Other Important Factors

The proposed rule perpetuates the agency's current "species centric" view of ecological sustainability. Such a view is encouraged by extant interpretations of species-centric legal requirements (e.g., of the ESA) but does not provide a solid foundation for proper forest management. Too much emphasis is placed on species-specific questions that are impractical or impossible to answer. The result has been weak science and failed administrative procedures.

The issue can be illustrated from one general statement in the explanatory comments:

"The productivity of an ecosystem can be sustained over the long term only if species that provide the appropriate structure and function for the system are maintained."

This statement appears to irrevocably intertwine the welfare of each species and the ecosystem, so that the fate of an ecosystem is tied to the preservation of the species, and possibly each individual member of the species.

Another problem is that the proposed rule perpetuates the myth that species are somehow adapted to "natural conditions" and that efforts to restore natural conditions will surely promote species viability. Both assumptions are questionable as general guidelines and demonstratively false in many instances.

There is nothing wrong with using the viability of species as an indicator, but it is difficult to argue that it should be the main indicator in all situations. Forest areas function differently, and the status of species within those forests might vary according to conditions. Different species could be in different evolutionary phases that would make their role and status within a functioning ecosystem different.

16. The Proposed Rules Provide Too Much Discretion to Forest Supervisors to Circumvent Required Procedures.

At the same time that the proposed rules appear to remove some of the substantive decision-making from the forest supervisors, they give the supervisor significant discretion whether to follow prescribed procedures. This makes many of the procedural requirements meaningless.

Of particular concern to us are the collaborative procedures described in 219.12 through 219.18. The collaborative approach is one that Farm Bureau supports. It should give the local communities significant input into the way that local national forests are to be managed. Farm Bureau supports local determination of this type.

As we have seen, the proposal begins stripping away local determination through its acknowledgement and acceptance of national and regional planning. Initiatives such as the national roadless area policy and national transportation policy in national forests seriously erodes local determination on these issues.

The proposal also casts doubt on the viability and utility of the collaborative procedure outlined in the proposed rule. Section 219.12(a) states: The responsible official has full discretion to determine how and to what extent to use the collaborative processes outlined in Secs. 219.12 through 219.18." This grant of discretion completely negates the force and effect of the collaborative procedure. What good is having such a procedure if the agency official has discretion to avoid it?

This is not the only case where the agency is given such discretion. The agency official also has discretion whether to use assessments and what type of information to collect. (219.5). The agency official also has discretion to determine whether and to what extent topics of general concern should be discussed further. (219.4(b)).

Discretion to avoid procedural requirements such as are described above weaken the proposed rules and render them meaningless. We encourage the agency to establish standards for complying with these procedural requirements rather than allowing agency personnel to avoid them.

These are some of the general issues which concern us about the proposed rules. We thank you for the

opportunity to provide comments, and hope that you will carefully consider our comments.

Sincerely,

Richard W. Newpher

Executive Director

Washington Office

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